IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1555 OF 1992

1. M/s.Devidayal Rolling Mills
   Gupta Mills Estate,
   Reay Road, Bombay 400 010

2. Sumanbala Aggarwal,
   residing at 69, Mount
   Unique, Peddar Road,
   Bombay - 400 026 .. Petitioners.

V/s.

1. Y.R. Saini, Assistant
   Commissioner of Income-tax,
   Central Circle 31, Bombay
   having his office at 7th
   floor, C.G.O. Building
   Annexe, M. Karve Road,
   Bombay - 400 020.

2. Surinder Pal Kaur,
   Commissioner of Income-tax,
   Central II, Bombay, having
   her office at 10th Floor,
   C.G.O. Building Annexe,
   M. Karve Road, Bombay 20.

3. The Union of India .. Respondents.

Mr.B.V. Jhaveri, Advocate with Ms.Manju Sisodia for the petitioners.

Mr.Ashok Kotangale, Advocate for the respondents.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 13TH JUNE, 2006.

ORAL JUDGMENT (Per J.P. Devadhar, J.) :

1. This petition is filed to challenge the validity of the notice dated 26th March, 1992 issued under Section 148 of the Income Tax Act, 1961. The

said notice was issued by the Assistant Commissioner of Income Tax, Central Circle - 31, Mumbai with a view to reopen the assessment for A.Y. 1981-82 in the case of M/s.Devidayal Rolling Mills - the petitioner No.1 herein. This petition was admitted on 12th August, 1992 and further proceedings pursuant to the impugned notice dated 26th March, 1992 were stayed.

2. The facts relevant for the present petition are that : M/s.Devidayal Rolling Mills - first petitioner herein (hereinafter referred to as 'the assessee') was engaged in the business of converting copper wire bars into copper rods or coils. The process of converting copper wire bars into copper rods or coils is known as 'hot rolling process' and involves heating of bars in a furnace to a very high temperature and thereafter feeding the red hot bars through various rolling and stretching processes, whereby the width and diameter of the bars gets reduced to the required dimensions. It is an admitted fact that the process of converting copper wire bars into copper rods or coils, involves loss of copper metal in the form of copper oxide etc. which are all collected as waste residue. Though the metal can be recovered from such waste residue, the assessee instead of resorting to such process, has

been selling the waste residue from time-to-time and the amount so realised have been accounted for in the books of accounts maintained by the assessee.

3. During the assessment year 1981-82, the assessee had sold waste residue for Rs.4,52,874/- and the same was duly recorded in the books maintained by the assessee. On 27th August, 1981, the assessee filed its return of income for the assessment year 1981-82. In the profit and loss account, the assessee had disclosed miscellaneous income of Rs.6,21,240/- which included waste residue sold at Rs.4,52,874/-. During the course of assessment, the Assessing Officer by his letters dated 31st October, 1983 and 30th January, 1984 called for further particulars relating to the collection of waste residue as also the particulars relating to sundry sales of waste residue. The assessee furnished the requisite particulars and on being satisfied the Assessing Officer accepted the receipts on sale of waste residue and passed an assessment order under Section 143(3) of the Act on 24th March, 1984. It may be noted that the assessee had filed an appeal against the assessment order on certain other issues and even the C.I.T. had initiated action under section 263 of the Income Tax Act, 1961 for assessment year 1981-82 on certain other issues,

however, those proceedings are not relevant for the purposes of the present petition.

4. By the impugned notice dated 28th March, 1992, the Assessing Officer sought to reopen the assessment for assessment year 1981-82 by recording the reasons for reopening the assessment. The said reasons recorded by the Assessing Officer for re-opening the assessment for A.Y. 1981-82 read thus :

> "M/s.Devidayal Rolling Mills.
> A.Y. 1981-82
>
> Column 11 : Reasons :
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> For.A.Y. 81-82 (previous year 1.5.79 to 30.4.80) the assessee has shown sale proceeds of waste residue (copper oxides amounting to Rs.4,23,790/- only. The total quantity of copper bars rolled or processed by the assessee in this period was 12115.591 M.T. The total processing charges received by the assessee are Rs.56,04,055/-.
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> During the course of enquiries u/s.131 in the case of M/s.Omega Rolling Mills Ltd. it has been observed that these assessees are claiming 1% burning loss from the total processed material. It has been stated on oath by the Director of M/s.Omega Rolling Mills Ltd. that about 90% of the burning loss (i.e. 0.9% of the processed material) is recoverable in the form of copper oxide (waste residue) which is saleable in the market. The rate of this copper oxide is dependent on the market rate of copper bars and the demand in the market. M/s.Omega Rolling Mills Ltd. has sold copper oxide in the accounting period 1989-90 and 90-91 at the rates varying from Rs.60/- to Rs.72/- per kg. dependent upon the market price of pure copper. The rate of copper oxide is in general, 25% less than the rate of copper.

> The average rate of copper for the accounting period relevant for A.Y.81-82 was Rs.33.38 per kg. (M.M.T.C. rates). Our assessee had claimed total burning loss of 121.15 M.T. for A.Y. 81-82. Since 90% of this burning loss is recoverable the assessee had prima facie, recovered 109.035 M.T. (90% of 121.15 M.T.) of copper oxide. Since the average rate of copper was Rs.33.38 per kg. at that time, the rate of copper oxide (which is normally 25% less than the market price of copper) works out to be Rs.25.03 per kg. (75% of Rs.33.38). The total prima facie sale proceeds of copper oxide for A.Y. 81-82 (on the sale of 109.035 M.T. of copper oxide) work out to be Rs.27,29,690/-. The assessee has shown such sales to the tune of Rs.4,23,690/- only. Thus, there is a prima facie concealment of net income on account of unaccounted sales of copper oxide to the tune of Rs.23,05,900/-.
>
> On the basis of these facts, I have reason to believe that this income to the tune of Rs.23,05,900/- has escaped assessment for A.Y. 1981-82. Hence, it is necessary to re-open the assessment for A.Y. 81-82 u/s.147 of I.T. Act by issuing notice u/s.148. As per the provisions of S.151, the prior sanction of CIT is required for issuing such notice for A.Y.81-82. Hence, the note is put up to the CIT, Central II, Bombay for granting approval for the issue of notice u/s.148 in this case for A.Y.81-82."

5. Mr.Jhaveri, learned counsel appearing on behalf of the petitioners submitted that the proceedings under section 147 of the Income Tax Act, 1961 can be initiated only if the conditions set out therein are fulfilled. He submitted that reopening of the assessment beyond four years from the end of the relevant assessment year is permissible only if it is established that there was failure on the part

of the assessee to disclose fully and truly all material facts relevant for the assessment. He submitted that in the present case, the Assessing Officer before passing the assessment order had called for particulars regarding the collection as well as sales of waste residue and accordingly the assessee had furnished all the particulars and only thereafter the assessment order was passed. Therefore, it cannot be said that there was any failure on the part of the assessee to disclose fully and truly all material facts. Moreover, in the reasons recorded by the Assessing Officer, it is neither alleged that there was any failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment nor there is any material to suggest that infact the assessee on sale of waste residue had received amounts more than what was disclosed by the assessee. In these circumstances, it cannot be said that there was failure on the part of the assessee to disclose all material facts.

6. Mr.Jhaveri further submitted that the fact that in the A.Y. 1991-92 M/s.Omega Rolling Mills Limited had recovered of higher percentage of waste residue cannot be a ground to reopen the assessment of the assessee for A.Y.1981-82, because, firstly the

business carried on by M/s.Omega Rolling Mills Limited is not comparable with the business of the assessee and secondly the price of waste residue sold in the A.Y. 1991-92 can be applied for the sales effected in the A.Y.1981-82. He submitted that in the case of the assessee, the Income Tax Authorities year after year had investigated into the recovery of waste residue and sale thereof and on verification had accepted the sale receipts accounted by the assessee from time-to-time. He submitted that in a subsequent assessment year, the Assessing Officer infact had made additions on the basis of the sale price recorded by M/s.Omega Rolling Mills Limited but the same was not approved by the Income Tax Appellate Tribunal. Accordingly, Mr.Jhaveri submitted that the reopening of the assessment for A.Y.1981-82 based on the sale price of waste residue recorded by M/s.Omega Rolling Mills Limited in the assessment year 1991-92 is wholly unjustified.

7. Relying upon the decision of this Court in the case of Hindustan Lever Limited V/s. ACIT [268 ITR 339 (Bom)], Caprihans India Limited V/s. DCIT [266 ITR 566 (Bom)], Grindwell Norton Limited V/s. ACIT [267 ITR 673 (Bom)], German Remedies Limited V/s. DCIT [(2006) 150 Taxman 398 (Bom)], IPCA Laboratories Limited V/s. Gajanand Meen Dy.CIT [251

ITR 416 (Bom)] and also the decision of the Apex Court in the case of Indian Oil Corporation V/s. ITO [159 ITR 956 (SC)], Mr.Jhaveri submitted that as the the revenue has failed to establish that there was any failure on the part of the assessee to disclose fully and truly all material facts, the reopening of the assessment beyond four years from the end of the relevant assessment year cannot be sustained. Accordingly, Mr.Jhaveri submitted that the impugned notice dated 26th March, 1992 is liable to be quashed and set aside.

8. Mr.Kotangale, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the business carried on by the assessee was similar to the business carried on by M/s.Omega Rolling Mills Limited and once it is found that in view of the high content of copper the sale value of waste residue should be much more than what is declared by the assessee, then it becomes evident that the assessee has failed to disclose all material facts. Relying upon the decision of the Apex Court in the case of Phool Chand Bajrang Lal & Another V/s. Income-tax Officer and Another [203 ITR 456 (SC)], Mr.Kotangale submitted that the fact that the false statement made by the assessee has been accepted by the Assessing Officer would not preclude the

Assessing Officer to reopen the assessment especially when it is found that statement made by the assessee is prima facie found to be false. Accordingly, Mr.Kotangale submitted that there is no infirmity in the notice issued under Section 148 of the Income Tax Act.

9. We have carefully considered the submissions made by the counsel on both sides. It is well established by various decisions of this Court as well as the Apex Court that where an assessment order passed under Section 143(3) is sought to be reopened beyond four years from the end of the relevant assessment year, the revenue must establish that there was failure on the part of the assessee to disclose fully and truly all material facts relevant for the purposes of the assessment. In the present case during the assessment proceedings for A.Y. 1981-82, the Assessing Officer did call for full particulars relating to recovery of waste residue as well as the sales thereof. It is only after being fully satisfied, the Assessing Officer accepted the sale price recorded by the assessee in its books of account and passed assessment order under Section 143(3) of the Income Tax Act. In the reasons recorded for reopening the assessment it is neither alleged that the sale receipts recorded by the

assessee in its books of account were incorrect or false, nor any material is adduced to show that the amounts actually received by the assessee on sale of waste residue was higher than what was recorded in the books maintained by the assessee.

10. It is pertinent to note that even during the assessment proceedings for A.Y.1977-78 and A.Y.1978-79 the Assessing authority had called for full particulars relating to the recovery of waste residue and sales thereof and after detailed discussion, the burning loss / waste residue as well as the sales thereof declared by the assessee were accepted. In these circumstances, when the Income-tax authorities year after year have investigated into the sales of waste residue effected by the assessee and have accepted the sale price recorded by the assessee, in the absence of any material on record to the contrary, it could not inferred that the assessee has failed to disclose fully & truly all material facts.

11. In the present case, the only reason recorded for reopening the assessment is that M/s.Omega Rolling Mills Ltd. have shown higher sale value of similar waste residue sold by them during A.Y.1991-92. There can be no dispute that the sale

price depends upon the demand for the goods at the relevant time. Therefore, the market price of waste residue prevailing in A.Y.1991-92 cannot be taken to be the market price prevailing in A.Y.1981-82. Even if the market price of waste residue in 1981-82 could be higher than the sale price received by the assessee, unless there is any material on record to show that the assessee had actually received on sale of waste residue more amount than what was declared by the assessee, it cannot be said that there was any failure on the part of the assessee to disclose fully and truly all material facts. In the present case, there is not an iota of evidence to show that the assessee had received higher sale price than what was declared by the assessee. The fact that the assessee could have sold the goods at a higher price would not constitute failure on the part of the assessee to disclose fully and truly all material facts. In these circumstances, the reopening of the assessment on the ground that the income has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts cannot be sustained.

12. It may be noted that in the regular assessment for A.Y.1988-89, the Assessing Officer sought to reject the sale price declared by the

assessee and make additions based on the sale price of M/s.Omega Rolling Mills Ltd. However, such additions have not been sustained by the ITAT. It is not known as to whether the revenue has accepted the above decision of the Tribunal or not. In any event in the absence of any material on record to show that the amount received by the assessee on sale of waste residue in A.Y.1981-82 was more than the amount offered by the assessee, the concluded assessment for A.Y.1981-82 could not be reopened in the year 1992 on the ground that the market price of waste residue in A.Y.1981-82 was higher than the price at which the assessee had sold the goods.

13. The decision of the Apex Court in the case of Phool Chand (supra) has no application to the facts of the present case. In that case there was a confessional statement made by the Managing Director of the assessee subsequent to the assessment. In the present case, there is no material on record to suggest that the price declared to have been received by the assessee was incorrect, incomplete or false. The entire case of the revenue is based on the presumption that in view of the higher sale price of waste residue shown by M/s.Omega Rolling Mills Ltd., in the A.Y.1991-92, the sale price in A.Y.1981-82 must have been higher than the price claimed to have

been sold by the assessee and, therefore, there is failure on the part of the assessee to disclose fully and truly all material facts. Unless there is direct or circumstantial evidence to show that the income received on sale of waste residue was more than what has been declared, it cannot be said that the assessee has failed to disclose fully and truly all material facts. In the present case, the reopening of the assessment is based on the presumption that the assessee might have recovered higher amount than what was declared by the assessee and there is no material on record to suggest that the assessee had received higher amount which has escaped assessment. In these circumstances, it cannot be said that there was any failure on the part of the assessee to disclose fully and truly all materials. Consequently, the reopening of the assessment by the impugned notice dated 26th March, 1992 cannot be sustained.

14. In the result, the petition succeeds. The impugned notice dated 26th March, 1992 issued under Section 148 of the Income Tax Act, 1961 is quashed and set aside.

15. Rule is made absolute in the aforesaid terms with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)